

APPEAL DOCUMENTS

Fred Thomas
Dark Harbor Partners
190 Two Lights Road
Cape Elizabeth, ME 04107

Ms. Susan M. Lessard
Chair
Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017


April 20, 2009

Dear Ms. Lessard,

Please find attached an appeal brought by Dark Harbor Partners and joining appellants in the matter of licensing decision (L-24406-4P-A-N). This license permits Arthur B. Choate to construct a pier, ramp and float system on Wharf Landing Way East, in the town of Islesboro.

We request the opportunity for a public hearing.

Sincerely,

Fred Thomas

Managing Partners
Dark Harbor Partners

Summary of appeal

Procedural history and standing

On March 24, 2009, the Department of Environmental Resources (DER) approved a Natural Resources Protection Act (NRPA) application for Arthur B. Choate to construct a seasonal pier and float system on Wharf Landing Way East in the Town of Islesboro. Dark Harbor Partners, Harry B. Hollins and Nicholas T. Love are abutters and are aggrieved persons. James R. Houghton and Laura Ault are individual owners of land nearby and are aggrieved persons. Mrs. Ault and Messrs. Hollins, Houghton and Love are joining Dark Harbor Partners in the appeal.

Basis for the appeal and remedy requested

The appellants assert that the Department incorrectly applied the avoidance, assessing and mitigating impacts to scenic and aesthetic uses and no unreasonable impact standards of the Natural Resources Protection Act. The Department also failed to consider Maine common law as it relates to the salvaging of the granite blocks for this project. The appellants request that the Board reverse the March 24, 2009 Department decision and revoke the license.

New evidence submitted by appellants

The two aerial images are material and relevant because they provide a more accurate picture of practicable alternatives available to the licensee and a more accurate assessment of the composition and character of the landscape of the area surrounding the project site. The standard boundary survey is material and relevant because it shows the property line extending to and through the granite blocks that the licensee proposes to salvage for the project. The correspondence is material and relevant because it indicates that there is mooring availability at the Tarratine Club and at the town facilities. The Tarratine Club harbor rules are material and relevant because they state that club members are allowed to permanently moor whalers, skiffs and dinghies to the club floats.

Standards incorrectly applied by the Department

Avoidance: The appellants assert that the Tarratine Club is an alternative that is reasonable and practicable and substantially less damaging to the coastal wetland given that it is an existing common water access point that serves the area.

Assessment and mitigation: Of the fifteen piers shown on an image submitted by the licensee, only one is on the east side of the island; the remaining fourteen are on the west side of the island. On this basis, the appellants contend that the east side of Islesboro in the area shown "differs significantly" from the west side of the island in concentration of private piers and therefore maintains a more pristine character than the west side, when experienced from the air or from the water.

No unreasonable impact: The storage of the float above the high annual tide (HAT) in the upland of the proposed site will have direct and cumulative impacts on the scenic and aesthetic uses of the coastal wetland for the public and for the appellants. The pier system may not "perform as intended" given its exposure to seasonal winds and seas and the licensee's intention to dock a 42 foot boat alongside the float.

Procedural history

On or around October 31, 2008, Arthur B. Choate (1390 South Dixie Highway, Suite 2221, Miami, Florida 033146) filed a Natural Resources Protection Act (NRPA) application with the Department of Environmental Protection (the Department). The application is for a permit to construct a granite crib supported pier system, a seasonal ramp and seasonal float. The proposed site is located on Wharf Landing Way East in the Town of Islesboro. To the extent possible, the applicant proposes to salvage many of the blocks for the crib from a pre-existing structure located in the intertidal and sub tidal area adjacent to the project site. The Department approved the application (L-24406-4P-A-N) on March 24, 2009 (Please see Attachments 1 – 4).

Attachment 1: map of Islesboro

Attachment 2: location map

Attachment 3: aerial photo

Attachment 4: C-1 conceptual pier layout

Standing

Dark Harbor Partners (185 Wharf Landing Way East) are abutters to the north of the proposed site and are aggrieved persons. Harry B. Hollins (115 Wharf Landing Way East) is the abutter to the south of the proposed project and an aggrieved person. Nicholas T. Love (102 Wharf Landing Way East) is an abutter to the west and an aggrieved person. James R. Houghton (109 Wharf Landing Way East) owns land nearby to the south of the proposed site and is an aggrieved person. Laura Ault (189 Wharf Landing Way East) owns land nearby to the north of the proposed site and is an aggrieved person. Mrs. Ault and Messrs. Hollins, Houghton and Love are joining Dark Harbor Partners in the appeal.

Attachment 5: letters from aggrieved persons joining the appeal

Attachment 6: aggrieved persons map

Basis for the appeal and objectionable findings and conclusions

The appellants assert that the Department erred in its findings as follows:

- Avoidance. The Department did not correctly apply the avoidance standard.

- Assessing and Mitigating Impacts to Scenic and Aesthetic Uses. The Department incorrectly applied the standard.

- No unreasonable impact standard. The Department incorrectly applied the standard.

Other arguments

Property law. The Department failed to consider Maine common law as it relates to the salvaging of the granite blocks for this project.

Remedy requested

The appellants request that the Board reverse the March 24, 2009 Department decision approving the construction of a pier, ramp and float system on Wharf Landing Way East and revoke the license.

New evidence

The appellants reviewed the file in Augusta on March 31, 2009. The appellants find that information submitted by the licensee is misleading and incomplete. Consequently, the appellants assert that the Department made its licensing decision based on inaccurate or incorrect information and that the submission of new evidence is justifiable. Due to professional and personal commitments, Fred Thomas, Managing Partner of Dark Harbor Partners and the originator of this appeal, was unable to submit new evidence earlier in the process. The appellants showed due diligence in informing the Department of its intention to file new evidence by informing Beth Callahan (Project Manager, Division of Land Resource Regulation) by email on April 15, 2009 and informing Cindy Bertocci by voice mail on April 20, 2009.

Aerial images

The images submitted by the licensee are cropped in a manner that excludes nearby practicable alternatives from view and are enlarged in a manner that suggests that the surrounding area is already heavily developed with private piers (Please see attachment 2: location map and Attachment 3: aerial photo). These images provide misleading conclusions about the licensee's available and feasible alternatives and the impact the project has on aesthetic and scenic uses of the coastal wetland.

The tone of the licensee's project description and the supporting images of the blocks suggest that all of the granite blocks are located on the licensee's property. The Department is not aware that a portion of the granite blocks lie on the Dark Harbor Partners side of the property line.

The licensee incorrectly states that only dinghies are allowed.

Avoidance

The Department incorrectly applied the avoidance standard in Chapter 310 Section 5 (A) of the Natural Resources Protection Act. The appellants assert that the Tarratine Club is an alternative that is reasonable and practicable and substantially less damaging to the coastal wetland given that it is an existing common water access point that serves the area. It is representative of the type of "shoreland structure" that the Land Use Resource Commission (LURC) and Plum Creek envisage in the development of coastal wetlands in the Moosehead Lake Concept Plan. The analysis of practicable alternatives dated October 30, 2008 submitted by Gardley & Dorsky Engineering & Surveying of Camden, Maine argues that there are no practicable alternatives available to the licensee. The analysis includes misleading images and makes three objectionable statements.

Statement #1:

The applicant considered sharing an abutting or nearby pier. However, the applicant determined that this was not a feasible alternative option because the closest private pier (is) on the east side of the island is 0.6 miles to the south of the project site (Arthur B. Choate L-24406-4P-A-N, pg 4).

This statement is misleading. The image submitted by the licensee as part of the practicable alternative analysis excludes from view a "nearby and private pier" that is located 0.5 miles from the proposed site location on the west side of the island (Please see Attachment 3: aerial photo). This alternative is the Tarratine Club. The practicable alternatives analysis submitted by Dark Harbor Partners shows a more accurate picture of the practicable alternatives available to the licensee.

The appellants note that the licensee is a member of this club, the anchorage is safe and secure, moorings are available and access is feasible. Additionally, many club members travel substantially more than 0.5 miles to access the club's harbor facilities. Indeed, one of the appellants, James R. Houghton, who lives less than 0.5 miles from the club has kept his boat there for many years (Please see Attachment 17: James R. Houghton letter).

Statement #2:

The applicant considered utilizing a public or private slip/mooring space. The applicant determined that there are no slips or mooring spaces available at the local and private marinas. The applicant contacted the municipal code enforcement officer who stated that there is a waiting list for mooring space at the public marinas known as Ferry Dock and Big Tree (Arthur B. Choate L-24406-4P-A-N, pg 4).

This statement is misleading.

The appellants point out that the licensee provides misleading or incorrect answers to questions in the What Facilities Are Nearby? section of Appendix D of the Natural Resources Protection Act Application. The licensee fails to identify Big Tree and Ferry Beach as nearby public boat launch sites and the licensee fails to identify the Tarratine Club as the nearest public, commercial or private marina.

Attachment 13: Natural Resources Protection Act Application Appendix D

Statement #3:

The applicant considered usage of dock facilities at the Tarratine Club. The applicant stated that the Tarratine Club does not allow its members to have boats on their floats. The purpose of the floats is only for loading and offloading passengers. The applicant further stated that only dinghies are allowed to be at the dock for longer durations of time (Arthur B. Choate L-24406-4P-A-N, pg 4).

The licensee incorrectly states that "only dinghies" are allowed to be docked at the Tarratine Club for longer periods of time. It is common practice for club members to permanently moor skiffs and whalers as well as dinghies to the north side of the club's floats and to use these launches to access their boats moored in the harbor. This is a function of the rural nature of the coastal wetland where the club facilities are located. The club's regulations state the following: No tender of over 16 ft. in length or 72" in beam may be permanently moored to any club float

Assessing and Mitigating Impacts to Scenic and Aesthetic Uses

The Department incorrectly evaluates the impact of the project on the landscape as described in Chapter 315 (9A) of the Natural Resources Protection Act. The licensee states the following:

There are 17 residential piers within a one mile radius of the project site.

Attachment 14: Choate NRPA application - relevant information/project description, pg 1.

This statement and a supporting image (Please see Attachment 2: location map) suggest that the area surrounding the site is already heavily developed and influenced by human activities and that one more private pier will not make any difference. The appellants assert that to use a "radius of one mile" for comparison purposes is misleading. Of the fifteen piers shown on this image, only one is on the east side of the island; the remaining fourteen are on the west side of the island. On this basis, the appellants contend that the east side of Islesboro in the area shown "differs significantly" from the west side of the island in concentration of private piers and therefore maintains a more pristine character than the west side, a character that is "unique and identifiable" when experienced from the air or from the water. The image submitted by the appellant reinforces this conclusion

No unreasonable impact

The Department incorrectly applied the no unreasonable impact standard of Chapter 310 Section 5 (D) of the Natural Resource Protection Act. The licensee states the following (Please see Attachment 14: Choate NRPA application - relevant information/project description, pg. 2):

The gangway and float will be seasonally in-place, with the gangway stored on the pier and the float stored above the HAT (in the upland) during the winter months.

The storage of the float above the high annual tide (HAT) in the upland of the proposed site will have direct and cumulative impacts on the scenic and aesthetic uses of the coastal wetland for the public and for appellant Harry B. Hollins, whose property abuts to the south and who shares ownership of the beach where the licensee envisages storing the float. Additionally, the exposure of the upland to fall and winter storms may result in the storage of the float not performing "as intended". Finally, the storage of the gangway on the pier will impact the scenic and aesthetic uses of the coastal wetlands.

Nakomis Nelson, Chair, Islesboro Harbor Committee makes the following statement about the location of the proposed site.

We are concerned that the location is extremely exposed to the prevailing fall storm wind direction (SE) and to the winter storm direction (NE). Likely this pier would not be used at those times. However, even a summer southerly creates a good swell in the area of the proposed float.

Attachment 15: Nakomis Nelson letter to DEP 12/10/2008

The licensee envisages docking his boat at the float as is common practice in Miami, Florida and in urban locations. The licensee states that his boat is 42 feet in length and draws 4-5 feet (Please see Attachment 13: Natural Resources Protection Act Application Appendix D). In a letter dated January 29, 2009, Gartley & Dorsky state that the pier and float system is designed to withstand these seasonal winds and seas and there are other private piers with similar exposures. The letter does not indicate that the pier will be able to withstand these conditions with a 42 foot boat docked alongside it.

Attachment 16: Gartley & Dorsky letter to DEP 1/29/2009

The appellants contend that the pier may not "perform as intended" with a boat of this size attached to it, or if it does it will result in excessive wear and tear to the boat and to the pier system such that the arrangement is no longer feasible or practicable. The "benefits" the licensee enjoys from having a private pier is offset by the potential hazards of docking a large boat to a float in an area exposed to strong winds and seas in a location that is remote from marine support services. The appellants note that at low tide there is an estimated six feet of water at the end of the float, a narrow margin of safety for a boat that draws 4 to 5 feet water. Unintended poor performance and diminishing benefits stemming from the exposed location of the project suggests that the licensee may ultimately moor his boat elsewhere (either the Tarratine Club or in Florida), leaving a superfluous and poorly situated pier system, that characteristic of serial development.

Appellant James R. Houghton in his letter dated January 20, 2009, states the following:

The East Bay side of Islesboro is a wild stretch of water and is subject to many substantial storms that make it a less than ideal spot for docks or for landing

boats...that is one of the reasons why I have never considered a dock in the forty plus years I've resided there."

Attachment 17: James R. Houghton letter to DEP

Property law

The Department failed to consider Maine common law as it relates to the granite blocks described in the project. The appellants note that Maine common law extends private property rights to the low water mark subject to a public easement for fishing, fowling and navigation.

In his December 10, 2008 letter to the Department, Islesboro Harbor Committee Chair, Nakomis Nelson, makes the following statement (Please see Attachment 15: Nakomis Nelson letter to DEP 12/10/2008)

Additionally, there is a question of ownership to the abandoned granite blocks specified in the plans. The location of the historic steamboat wharf (source of granite) is now on two different pieces of property.

On February 10, 2009, Ms. Beth Callahan (DEP Project Manager) and Ms. Amy Lemelin visited the site. The purpose of the visit was to conduct a visual impact assessment of the project. On the Visual Impact of Development Matrix section of the report (pg. 2), Ms. Callahan and Lemelin state that the "Tide was too high to see steamship wharf remnants". The staff is unable to form a reasonable conclusion about the ownership of the granite blocks without seeing them at low tide.

Attachment 19: DEP Visual Impact of Development Matrix

The licensee states the following in the project description section of the license approval letter and submits images of the blocks.

The applicant proposes to salvage many of the blocks for the crib from a pre-existing structure located in the intertidal and subtidal area adjacent to the project site (Please see Attachment 14: Choate NRPA application – relevant information/project description, pg. 1).

This statement and the images suggest that all of the blocks lie entirely on the licensee's side of the property line. This is not the case (Please see Attachment 9: Dark Harbor Partners standard boundary survey).

Attachment 20: Pictures 1-4 Choate property Islesboro, Maine